Unsettled facts: On the transformational dynamism of evidence in legal discourse

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1. Introduction

This article concerns itself with the question of textualization in legal discourse. More specifically, it examines the ongoing treatment of some previously textualized evidentiary discourse by various legal figures. There has been a widespread and ongoing concern among many scholars who suggest that legal professionals intrinsically possess and regularly exercise interactional control over facts, sometimes to the detriment of adequate and effective service (O'Gorman 1963; Rosenthal 1974; Hosticka 1979; Cain 1983; Bogoch 1994). Controlling the production of facts can manifest itself in a variety of ways, one of them being the activity of creating 'records,' i.e., transforming spoken discourse that belongs to a non professional, i.e., the client, and, by default, the realm of the ordinary and mundane in accordance with the institutional rules of documentation (Garfinkel 1967; Benson and Drew 1978; Atkinson and Drew 1979; Raffel 1979; Travers 1997; Lynch 1999, 2002). For the legal research, the common problem with textualized appearances lies in 'the reduction of facts to law' (Stygall 1994: 88).

It has been further argued that the significance of record-making lies in their archival properties (Derrida 1996; Agamben 2002). Created in the course of the talk-to-text transformation, legal documents can be easily taken for containers of 'facts' or 'evidence.' Empirical studies that focus on the activities of documentation confirm philosophical suspicions in attributing to record-making the capacity to shape, reshape, and thus alter oral discourse by way of literalizing its 'core' for specific purposes of the legal establishment (Lemert 1969; Raffel 1979; Goodrich 1984; Goody 1986, Jönsson and Linell 1991; Lynch and Bogen 1996; Linell, 1998). Upon a closer scrutiny of these and other sources, it becomes

clear that the apparent problem with documenting activity of law is informed by two co-dependent assumptions: a) transfer from one communication medium to another, from one speaker to another, from one discourse to another, and from one situational task to another, implying b) the finite separation of the original discourse from its 'record.' In other words, it is assumed that, in its documented form, i.e., a written statement or a deposition, the defendant's narrative, is going to differ radically from its point of origin, an oral recital of facts. Moreover, in order for a fact of life to become a 'legal fact,' it *must* be pre-separated from the point of its origin. Secondly and co-extensively, for the 'record' to count as a fact, it *must* be fixed in the legal discourse as if it were an original.

It is to the second assumption that I would like to address this essay. At issue is the proposition that once in-text, discourse creates a singularity of meaning, which, from that moment on, allows legal professionals to refer to it as 'the same matter.' Since the process of documenting not only factualizes but objectifies discourse, I would like to approach documented facts, commonly known as evidence, as 'objects of discourse' or 'discursive objects.' Short of challenging the idea of fixeity per se, I would like to question the association between the documented statement and its identity. My hope is that this association, once disclosed, would give us the clue to the structure of the legal fact, or evidence; hence, the question for this examination, *How if factual identity is constituted in legal records?* The question receives diverse elaborations in recent critical examinations of discourse formation, which show that an object of discourse does not stop generating meaning once it undergoes a change in accordance with the rules of a specific medium and setting but continues to do so from within that medium by creating a space of signification of its own (Deleuze 1968; Foucault 1972; Latour 1996). For example, Gilles Deleuze proposes that in discourse, an object functions as a *virtual* object, and, as such, it is always necessarily partial. One part remains fixed in a particular discourse while the other is open to further signification. This structure is unsettled as it creates a conflict between the place of fixation

and the space of signification. Forgetfulness of this conflict brings about an impression of *reality* (1968: 100-103; *author's italics*). In legal discourse, documented texts are places of fixation par excellence. Not only they archive 'facts' following prescribed legal formats in a manner of Foucault's *panopticum*, their key purpose is to make these facts 'come alive,' that is perform themselves whether in front of the jury or the judge (Matoesian 2001: 105).

From this perspective, we can understand an object of discourse not simply as the same matter, a legal fact, but as a matter-in-becoming, which continues its dynamism from within the place of fixation. In turn, on the basis of this conceptualization we can conceive of the matter-in-becoming as an object of discourse that is able of transcending its original form and thereby 'appearing' in talk or in text, respectively. Matoesian calls this capacity for the evidential source to enter and leave different media through the intertextual connection 'production media' (2000: 880). Although helpful in showing how intertextuality generates inconsistency, the notion of 'production media' concerns itself with the ambiguous side of the fixed object. With this concern it complements the research on the 'career' of a legal statement, which is primarily interested in the definitive side of the transformational process. By focusing on the two polar outcomes, ambiguity and definiteness in a manner of separation, neither approach is able of clarifying the possibility that both outcomes can be effected simultaneously. I therefore suggest that, in this article, we investigate the processes and conditions that allow for an object to be both fixed, and, at the same time, retain its identifying features. With this dual focus, we should reformulate the previously posed question in the following manner, *How can a documented fact be and become, at the same time?*

For the process that maintains identity in difference I would like to take the concept of cohesion. Cohesion can be defined as a set of resources for constructing relations in discourse which transcend grammatical structure (Halliday 1994: 309). Thus defined, cohesion helps us trace the identity an object in the process of its becoming, i.e., as it takes place in a specific

space of signification. Importantly, the space of signification is not a thing, nor is it a sum of manifest entities. It is rather a set of conditions that allow for carrying out meaningful attributions. Those are always discourse and task specific. Their specificity is influenced by a particular setting; in turn, the setting shows itself in the means of its unfolding. For an object-in-becoming to continue, it must invariably engage three co-extensive levels: grammatical, semantic, and pragmatic. The relationship between the three levels is not a presumed one but manifests itself in certain discourse markers, such as the article, conjunction, pronouns, syntactic position, and synonymy, among others (Schiffrin 1987). Those and other means 'signal' the degree of sameness and difference, which is sufficiently subtle to create ambiguity and, at the same time, sufficiently definite to allow an interlocutor to understand the sameness of the object under discussion (Kartunnen 1968; Chafe 1976; Hawkins 1978; Du Bois 1980). The constitutive features of cohesion point again to the bi-polar structure of the discursive object: ambiguity resides on the other side of definiteness (He 2001; Gotti 2005). This is to say that ambiguity differs from non-definiteness because it comes about as a resource and not as a lack of definiteness (Schegloff 1984). Therefore, the relationship between definiteness and ambiguity is not that of subordination but that of co-determination. One can put it in this way: while definiteness comes about as a result of engaging certain explicating means, ambiguity provides for further explication.[1]

In the following section I investigate how a text-dependent legal object coheres while undergoing transformations in different media and in different voices (Ravotas and Berkenkotter 1998). The investigation is limited to several an oral excerpt and several documents from a specific case, the data for which was collected during extensive ethnographic fieldwork in a private law firm 'Dorman, Tucker and Tucker' located in a small town in one of the Great Plains States during two consecutive summers, in 2003 and 2004. [2] The firm consisted of three partners: Jack Dorman, my principal informant, and Tom and Frank Tucker, the firm's original founders. Jack was the attorney whom I shadowed for the

duration of my fieldwork. The firm's emphasis was family law: divorce and child custody cases comprised over seventy percent of the practice's earnings. Insurance and worker's compensation presented another lucrative category. In contrast to the civil caseload, criminal cases in the firm appeared on occasion and, in Jack's own words, were there 'to fill the gap.' Among those fillers, there were many misdemeanour cases, such as DUI (driving under the influence), Simple Assault, and Small Theft, with an occasional felony, such as Grand Theft, Aggravated Assault, Rape, and Manslaughter. The original focus of my research was criminal casework; more specifically, I was interested in the relationship between the pre-trail practices and activities that counted as preparatory for the criminal case and the ways they helped present the case at the trial stage. It was this interest that prompted Jack to invite me to the local jail for 'a talk with the biggest criminal on the Federal plate.'

The case in question had been under investigation for two years. Jack's client was charged with 'conspiracy, use of a communication facility in causing or facilitating the commission of a felony under the controlled substance act,' and a number of minor violations.[3] This is to say that he ran a small drug gang of low paid mules and distributors. Incarcerated at the time of my visit, Dane, the defendant, was facing the sentencing. About a month before the visit, in the face of the overwhelming evidence from the US Attorney, Dane agreed to a plea-bargain. The terms and the conditions of the plea-bargain agreement required that he disclosed the names and criminal actions of his accomplices, in other words, became a witness for the prosecution. In exchange for his cooperation, the Federal Government promised that his sentencing would be cut in half. The number of years to be reduced depended on the calculations made by the Probation Officer for the Federal Judge in accordance with the Federal Sentencing Guidelines in the Presentence Report. The purpose of the meeting with Dane in jail was to discuss the Report. The Report had been sent to Dane in advance together with the Jack's letter, which explained some of the technicalities, including those concerning the upcoming sentencing. On the designated day Jack and I walked over to

the county jail. The meeting took place in the jail's 'library.' The discussion lasted approximately forty minutes. I recorded parts of the interaction. In addition, I took extensive notes. The excerpt below is a transcript based on both sources of data. It begins several minutes into the conversation. The ethnographic bias for this examination prompts me to use the conference for an entry point into the discussion. Documented excerpts from the case file constitute additional sources of data for the subsequent analysis. The use of a single case points to the indicative rather than definitive spirit of this study. The transcription below is designed in the manner of the theatrical script, as a dialogue, where the speakers' names precede the utterances, while their dispositions and other context relevant information are given in square brackets.

2. 'A Bunch of Good for Nothing Rifles'

Excerpt (AT-P3-6704/40):[4]

Jack: 'So, as you can see, rule 35 will put you in the 27-32 month bracket. I know. I know, but that was the plea-bargain agreement [a few minutes later]. So, you are getting 27 to 32 years.'

Dane [looking shocked, to Jack]: 'What was did you just say? 27 to 32 years. You must be joking. Is it a joke? I hope not. Do you even know who I am? I am a nark.[5] Do you even understand what it means for a fucking nark to be in a maximum-security prison for 20 years. I will croak in the fucking prison. I will be in the same outfit as murderers and rapists and sadists. I will have to fight for my life every single day. My ass is grass, pal!'

Jack [somewhat sympathetic]: 'I understand that it is a disability; it will put you in a situation. But you will be able to deal with it. Besides, as I told you, you will not get that sentence. You cooperated, so they will cut it in half. You will be out sooner than you think.'

[ten minutes later]

Dane: ‘But you told me that I would get five to seven years.’

Jack: ‘It appeared that way first but that’s what happened. Look’ [pointing to a document in the file] ‘They added a couple of levels: you were on an unsupervised probation for some DUI misdemeanour and that upped your sentence by two levels.’

Dane: ‘So, I am getting four years of hard labor for a fucking misdemeanour!’

Jack [in overlap, ignoring Dane’s interruption]: ‘Then. Here. See? You had possession of

→ (1) illegal weapons.’

Dane [interrupting]:

→ (2) ‘But they were fucking BB guns. A .22 and a .35! I took them with me to shoot some damn prairie dogs. They were there in the trunk, and I told the cops when they pulled me over in Leams that they were right there in the fucking trunk. I didn’t hide nothing.’

[five minute pause, Jack leafing through the file]

Jack: ‘Okay, that’s good, and that’s what we need to talk about today. I will file an objection, and we are going to say that you had them rifles to shoot prairie dogs,

→ (3) right? And that it wasn’t like a GUN gun but a bunch of good for nothing rifles.’

Dane [interjecting]:

→ (4) ‘And they never found a handgun on me. They pulled me over, and they searched the car, and they found nothing. They took me to the station and they found zip in my house later.’

Jack [taking notes]: ‘Okay. Then, we are going to say that you showed good on these accusations and they need to ease off your back a little.’

Dane: ‘Fifteen years. I will croak in prison then, should have told the Feds nothing. I should have kept quiet and stay out of this plea-bargaining shit! I should have taken it to the fucking trial.’

There are several discursive objects generated by this account. For the reasons of economy, I would like to focus on only one of them, which was introduced by the attorney as 'illegal weapons' (marked → (1), the above excerpt). The item 'weapons' entered the interaction in the oral mode as it was enunciated by the attorney. Grammatically, it was given in the nominal form, as a substantive. This way of appearance is not accidental: according to Komter (2006), the nominal form is common if not preferential for the legal discourse because it reflects the nomilization of criminal charges in criminal codes and statutes. Coinciding with the act of enunciation is the act of pointing to the legal document that 'kept' the object. The referenced text was a copy of the Presentence Report compiled by the probation officer for all the parties (judge, prosecutor, and defense ensemble). The purpose of the document is to prepare the federal defendant, who chose to plead guilty, to the pre-calculated sentence. In addition to other functions (profiling the defendant), the document is designed to present the charges as well as various circumstances that aggravate or mitigate these charges. A formula from the Federal Sentencing Guidelines is applied to the calculations to designate a certain level that would give the judge a range of sentencing options. The place in the report that 'released' the item 'illegal weapons' dealt with the aggravating circumstance which, as the attorney explained earlier, increased the sentencing brackets by two levels. We might say then that the object came into the Presentence Report and then into the attorney's discourse linked to the legal rule. In turn, the use of a rule has to satisfy a particular pragmatic force (Conley and O'Barr 1990).

In the legal context this force is stated explicitly; it is inscribed in the very word that designates the initiative by the court against the citizen: 'a public complaint' (Drew and Holt 1988). The complaint against Dane Savery in regard to his illegal activities was stipulated by the following rule: 'Pursuant to USSG §2D1.1(b)(1), if a *dangerous weapon* (including a *firearm*) was possessed, increase by 2 levels. The defendant possessed and transported

firearms during drug transactions.' In this statement we find a split identity that precedes the attorney's 'illegal weapons'—'a dangerous weapon' and a 'firearm.' We might say then that it was the latter identity that was 'fixed' as a result of the talk-to-talk transformation. It was 'fixed' in text grammatically as an object, syntactically as a subject-object, semantically as a 'projectile weapon,' and pragmatically as an account in support of the legal rule (i.e., 'The defendant possessed…'). The textualization of this identity engages the operation of connecting the ordinary (a person in possession of a weapon) to the legal (possession of a firearm during drug transaction, an illegal activity) realms. With this transformation, the gun indeed becomes 'an illegal weapon.' Let us look at the original transformative path as it took place in the police report:

Incident Report: 213795z23

> 'after the truck pulled over, a man jumped out and started running…I called for a back-up and pursued the person on feet. When I caught up with him, I commanded him to drop on the ground and show me his hands. The person on the ground identified himself as Dane Savery […] When we searched the truck, we found small amounts of Cannabis and methamphedamine. In the trunk, I discovered two rifles, 22. Winchester and 35. Browning. The chambers of both weapons were empty. Also, in the trunk I found two unopened boxes with cartridges, one for each firearm […] As a result of my field investigation, I charged Savery with possession of illegal substance, read him his rights and arrested him' […]

This report does not only constitute the original document that 'captured' the item 'weapons' and 'firearms' for the first time, it establishes the pattern of transformation of the ordinary term 'rifle' through a concretization (minimization) of the kind of rifles into technical terms, 'weapons' and 'firearm.' In their actions--searching the vehicle and confiscating the weapons—the police were mindful of 'Rule 104, Article 1 of the US Criminal Code 'Rules of Evidence.' Importantly and in accordance with the rule, the mentions of the weapons at this

point are not thematized in terms of their legality (as they were not used by the defendant and were legal to possess due to their small calibre which excluded them from the list of licensed weapons), but are noted in the prospective sense, as a possibly illegal item. The arrest was committed on the basis of 'possession of illegal substance,' not 'illegal weapons.' In this regard, Martinez (2006) is helpful in showing how the interrelationship between the rules, the texts and the activities of collecting evidence creates a complicated environment that allows some oral discourse (e.g., witness testimony) to become a case-relevant object of law by way of fixing it in a specific documented form.

By returning to the replica of this form, the attorney 'unfixes' it, without removing it from the legal discourse altogether (as he could have done by starting a general discussion of different types of weapons and their usefulness in hunting different kinds of game; instead, he 'sets the fixed identity in motion'). Let us examine now how 'the unfixing' is made possible. First, the attorney reformulates the textualized object by giving it a somewhat altered form; he substitutes the 'dangerous' for 'illegal.' The point of institutional reformulation is to create a device 'through which a practice is mobilized by participants in a given interaction' (Drew 2003: 296). In other words, the reformulation provides a summary of the previous discourse in terms of another discourse that pursues a specific purpose. In this case, the purpose of the summarized term 'illegal weapons' is to provide an account for the defendant's accusation. The lexical choice of modifier 'illegal' connotes a degree of ambiguity: to simply claim that something is illegal is only to claim that something could be subjected to law. The pluralization of 'weapons' reinforces ambiguity by endowing the object with volume and consistency of a generic item.

It is to that 'identity' that Dane responds with his own formulation: 'fucking BB Guns. A .22 and a .35' (marked → (2), the above excerpt). With his response, he turns down the attorney's use of the legal term for a much more potent colloquial expression. On a formal level, he also rejects both the identity offered by the attorney and the fixed textual identity.

However, we cannot say that Dane's act of reformulation managed to remove the object under discussion from the legal space of signification. By his own admission, Dane read Jack's letter of June 19, 2003, which contained the following formulation: 'We have only 10 days from the date we received the Report (June 18), to file objections to this. Call me as soon as you can.' In addition, the letter included a detailed explanation of the reasons given by the probation officer for several increases up to Sentencing Level 35. The one concerning the illegal weapons was described by the attorney as follows: 'You also received a level 2 for the use of a gun in the matter.' Thus, the documents received by Dane prior to the conference and apparently examined by him offered him a choice of the three co-determining terms: 'dangerous weapons' and 'firearms' as stated in the Presentence Report and 'gun' as stated in the attorney's letter. Dane deployed 'fucking BB guns. A '.22' and a '.35,' however. By not repeating the term-in-text, but proffering his own term, unsurprisingly, Dane disaffiliates from the Probation Officer and somewhat affiliates with Jack, whose semi-formal formulation of 'guns' gives Dane a 'lead' to his own expression. In it, Dane manages to downgrade the legal term 'weapons' to the mundane 'guns,' thus challenging the relevance of the term 'weapons' as a term contextualized in law. His further description of the guns in the context of their calibre and intended use ('shooting prairie dogs') formulates the challenge in the positive terms as an intention to 'legitimize' the identity of 'guns' on the grounds of 'common sense.' Collaborating in 'close proximity' helps Dane and his attorney make a selection of the 'right' kind of information for its subsequent reformulation in what appears to be 'direct evidence' (Sarangi 1998: 263).

The next reformulation comes immediately after and belongs to the attorney: 'them rifles….not like a GUN gun…a bunch of good for nothing rifles' (marked → (3), the above excerpt). The reformulation is given as a lateral repeat of the defendant's downgrade; however, its form exhibits some difference. The phrasing of 'good for nothing rifles' presents specific guns as a general category of 'rifles.' Although ostensibly a 'weapon,' 'rifle' is a

category that does not usually include handguns, or automatic weapons. Rifles are used for hunting; so, they can be *just* rifles. Therefore, following the trajectory of the client's reformulation, in his own reformulation, the attorney signals his acceptance of the defendant's downgrade as the primary reason for the subsequent legal action: 'I will file an objection.' With this act, the item 'rifles' is set to be transposed back into the properly legal realm as a legal arguable. Dane's clarifying interjection at this point is important for the collaborative nature of the identity construction: 'And they never found a handgun on me' (marked → (4), the above excerpt). In this formulation, Dane clearly denies the existence of one type of illegal weapon, while admitting to the other identified by the attorney as 'a bunch of good for nothing rifles.' Note, in this connection, the purposefully ambiguous phrasing of Jack's promise that follows: 'Then, we are going to say that you showed good on these accusations and they need to ease off your back a little.' The guns are no longer in discourse; instead, the attorney refers to the overreaching pragmatic act, 'accusations.' The phrasing is not just ambiguous but idiomatic ('ease off your back a little'). In their analysis of topic transitions in the ordinary talk, Drew and Holt (1998) showed that the use of figures of speech functions as summaries and therefore transition points. Indeed, at the end of the above excerpt, after Jack's summary, the topic shifts to other matters (drugs and witnesses). The promised act finds its written match in the attorney's notes:

wants to argue 'illegal weapons'

also, the amounts

write letter to PA

Thus, in a highly economical, which is also to say, definitive, and at the same time ambiguous manner, the attorney transforms the content of the client's complaint by giving it a succinct formulation: 'illegal weapons.' It is worth noting that the attorney's written formulation is identical to his initial oral formulation. Scheffer gives a detailed examination of the attorney's notebook to show that case-making is essentially a process of selective binding of 'fresh talk'

to gathered facts' (2006: 337). Below 'illegal weapons,' he puts down 'the amounts' referring to the Federal Sentencing Guidelines that specify the quantity of the discovered drugs in terms of the brackets or the number of years of imprisonment. This relationship should give us the idea as to the relational identity, or the identity of one object being defined through the identity of another. The pragmatic force fills the semantic content with a purpose: the construction of the upcoming argument, as in the attorney's promise to Dane ('we will say'). By his promise, Jack intends to create an arguable that would reveal the identity of the 'illegal weapons' via its relation to another item, 'drugs.' It is then not the discursive object but the relation of one item to another that comes to serve as the 'arguable' in the attorney's correspondence. According to Coulter (1990), arguable is a sequentially topicalized item of argumentation. For constructing his particular arguable, the attorney simultaneously employs several identities for the same object: the identity 'illegal weapons' as a shell, and the repeat on the downdrage originally given by the defendant, 'good for nothing rifles,' as the implicature (Levinson 2000). The mode in which the attorney is going to carry out this transposition is writing, which meant another round of textualization.

It might be helpful at this juncture to make a provisional summary for our analysis. Thus far, we have seen how, in a stepwise fashion, the defense attorney and his client topicalize an item extracted from the legal record and reformulate it several times, while the attorney is compressing it into a handwritten text, his notes. We have also seen that the object of discourse acquired several interrelated identities that entered into a competition with each other for impact in fulfilling a certain pragmatic task: present a most proper figure. By 'proper' I mean fitting to the purpose of the interaction (provide a response to the Presentence Report). From this perspective, discursive identity is pragmatic; it is a figure that, once placed within the legal discourse, functions as an 'arguable.' Therefore, the movement from an object identity to another object identity, from one item to another, designates the process of figuration which is an interactional and communicative accomplishment of a particular

pragmatic task. It is in this process then that I see an inherent dynamism of the discursive object in legal discourse. Importantly, no distance is covered by 'reidentifications,' only new figures and therefore new arguables are being made at the 'figurative pivot' (Holt and Drew 2005: 35). The next excerpt shows the resources employed as to turning the previous arguable 'a bunch of good for nothing riles' into the arguable 'The Defendant herein has always owned firearms.' It is not surprising then that we find this arguable in the attorney's Objection to Presentence Report, Paragraph 22.

3. From 'Firearms' to 'Firearms'

> 'Defendant objects to the 2 level increase for possession of a firearm. Specifically, FSG§2D1.1(b)(1) provides that 'If a dangerous weapon (including a firearm) was possessed, increase by two levels.' However, commentary note Number 3 provides that 'The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.' The Defendant herein has always owned firearms. He possessed firearms before he was involved in drug trafficking. He had not changed his manner of firearm possession simply because he was dealing drugs. As such, it is improbable that the weapon was connected with the offense.'

In this excerpt, the attorney joins the argument instigated by the probation officer, who, in his Presentence Report, refers to rule FSG§2D1.1 (b) (1) that defines the preferred umbrella form for the discussed item, and, through this encompassing formal category, links it to the arguable, that is, a set of legal (formal) reasons, e.g., 'If a dangerous weapon (including a firearm) was possessed, increase by two levels.' A strong orientation to rules turns them into the preferred arguables for legal discourse (Halldorsdottir 2006). In this particular case, one might expect the argument to develop on the original grounds of the downgrade, meaning that

the emphasis is going to fall on the relevancy of a kind of gun and that the defendant's formulation 'BB guns' will be expressed in the corresponding definition of a 'not [so] dangerous weapon.' Instead, the attorney constructs an exemption from the rule by offering a set of progressively ordered references to the defendant's habitual behavior associated with 'firearms' in general. The terms 'firearm' comes linked to the term 'weapons,' the item that the attorney marked for textualization. The modifier 'illegal' of the original phrase is omitted for the reasons of ambiguity: the attorney is creating a space for the route that would let him introduce the behavioral pattern of the defendant. Attributing and denying responsibility is inevitable in the context of accusing someone of a wrongdoing (Pomerantz 1978). Note in this connection the emphatic use of adverbs 'always,' 'before,' and 'simply' in the last three sentences of the excerpt. These uses indicate that under the attorney might be resorting to 'an extreme case formulation' deployed, for one, 'to defend against or counter challenges to the legitimacy of complaints, accusations, justifications, and defenses' (Pomerantz 1986: 219). Together, they meet on the same semantic platform of 'consistency.' The shift means new implications for the identity of the object under discussion. Whence positioned within the 'character' argument, the formal use of the term 'firearms'--coupled with the term 'illegal weapon'--points not to a new but to the old and vulgar identity of a gun, which, although no longer harmless in itself, becomes harmless in the hands of the 'consistent' defendant, and therefore can not be considered as a dangerous weapon.

In this way, the object originally defined as 'illegal weapons' again discloses its duality; it is both definitive and ambiguous. Its definitiveness is maintained by two referential linkages: a) to the defendant as the self-admitted criminal and the possessor of the 'guns,' and b) to the legal rule that specifies the role of the guns as 'illegal weapons.' Although the item 'weapon' is presented in the generic sense, as an arguable it provides the generic item with specificity by performing a reduction to instrumentality, the weapon's 'use.' The connection of the 'use of weapons' to the specificity of the defendant's behavior merges the definitive

and the ambiguous toward presenting the previous figure as yet another figure. This other figure has a different lexical form, and a different act is assigned to it. Although it is textualized in the same medium, writing, it is placed on a different trajectory of opposition. At the end of this trajectory, the multi-term 'firearm-illegal weapon' undergoes a pivotal transfiguration through the argument, changing the meaning of 'illegal weapons' first to 'useless guns' and then to 'possessed weapons.' The co-presence of these terms within the same argument not only endows the transfigured object with definitive ambiguity; they make the argument itself appear as two-sided again, namely, introduced as the legal argument about the danger of possessing weapons for the criminal, in the course of its construction, the argument links itself to the discussion of the defendant's character in terms of his probable actions. The mechanism of connecting is reminiscent of the one done in civil litigation, where a dispute undergoes transformation by splitting the initial claim into several claims by the contrary party (Felstiner et al. 1980-1981). In the Savery case, the duality is upheld in the response from the Probation Officer who presents the object under discussion as a cluster of lexical variants, using the informal 'guns' and formal 'firearms' intermittently. His use of the two identities in the Addendum to the Presentence Report, Paragraph 22, differs drastically from that of the Attorney's Objection.

4. Making Way for 'Firearms' with 'Guns'

> 'As noted in Paragraph 9 of the Presentence Report, the defendant traded guns for methamphetamine. Several of the individuals involved in drug transactions with the defendant reported they traded guns for drugs with him. In addition, others witnessed him possess a firearm, either on his person or in his vehicle, while trafficking drugs or using drugs. The defendant told Alice Iron Ax the reason he carried a firearm was to protect himself and in case law enforcement came around. She also reported on one of the trips to Sioux City for methamphetamine, he transported 12 guns in the back seat of his vehicle. There are several cases that support an enhancement when there is a

> firearm present in connection with a drug transaction. The following cases support a two-level enhancement [further, ten cases are cited]. Therefore, the two-level enhancement should remain.'

From this passage it appears that the Probation Officer extends both items 'guns' and 'firearms' as the two branches of the same semantic tree. The use of the two terms appears to be interchangeable: the Probation Officer refers to both terms several times in the same context of witnesses and testimonies. However, the appearance of interchangeability is deceptive, for the two close synonyms reference two different fields of presence. While, the term 'guns' comes from the testimonies of the 'individuals involved in drug transactions with the defendant,' the use of 'firearm' references the defense attorney's objection; it thus pursues a legal argument. By connecting the term 'guns' with the term 'firearm,' the attorney connects the two fields, which allows him to present the original object of discourse as a two-sided identity, replicating the object's structure from the Presentence Report. In turn, the co-presence of the two identities give witness testimonies, which come from the same field of presence as the defendant's testimony, as legal rather than common reasons. In those texts, the probation officer uses the term 'guns,' which, once positioned side by side with the term 'firearms,' not only allows for the dual identity of the object to continue but, and more importantly, for its legalization across the evoked identities. In the wake of this change, the everyday, which generates the defense attorney's argument, also becomes legalized. In a sense, the probation officer refigures the term 'weapon' in the opposite direction to the direction suggested in the defense attorney's Objection. It might be worth at this point to explore the content of the referenced testimonies, for they connect the character of the defendant to the use of weapons and finally to the weapons themselves.

Excerpts from Witness Testimonies:

(1) Salem (9/19/2001) reported that 'Savery is a violent person and always possesses a firearm. Avery has used firearms to intimidate people who are late with payments to Avery. He gets his arms in exchange for meth.'

(2) Garrison (9/19/2001) has observed 'Dane Savery with two handguns and two rifles. Garrison has observed Savery discharging a Glock .45 and 9mm pistol in front of his wife.'

(3) Belle Savery (12/12/2001) advised that 'Dane always carries a gun on his person. She estimated that he has approximately 30 guns. Dane always carries a gun in the small of his back. He also told he that he would use it 'without hesitation.''

(4) Amber Iron Ax (17/03/2002): 'Savery would say he would want to see her dance and would shoot his Glock .40 caliber near her feet. She observed numerous guns and a pistol and a silver 350 magnum. She observed him trade guns in various locations.'

The power of these testimonies lies in their collective and thus accumulative impact (there are twenty three accepted testimonies in the Savery's file). They formulate and reformulate the same object within a very limited space of signification. It is in this sense that their identity is collective; they also provide for the identification of the same object ('illegal weapons') through referencing a variety of actual brands of guns. Both handguns and rifles are mentioned. Their collective identity as an illegal weapon comes from two sources: all the references point to the relationship between the witnesses and the defendant. The second source is the identity of Savery himself at the time evoked in witness testimonies: from the testimonies, he clearly comes out as a drug dealer. Finally, as a drug dealer who handles weapons, according to the witnesses, Savery did not use them to 'shoot prairie dogs' but carry out intimidating actions. They were 'acting guns,' and though their actions exceeded 'common use,' they could only be illegal in the context of the defendant's illegal activities, which constituted the densest part of the case. By binding the defendant's specific objection

under the general category ‘illegal weapons,’ the defense attorney opened it for referential dispersal. Directing the dispersal from the documented witness testimonies, in his turn, the Probation Officer imposed the identity of ‘illegal weapons’ onto specific weapons, extending the defendant’s original ‘BB. guns’ or ‘not so dangerous weapons’ into the category ‘dangerous weapons.’

With these acts, the probation officer and the defense attorney collaborate in integrating the defendant’s object into the previously established set and then defining the set in terms of the argument, now on the level of evidence. To put it differently, by his objection, the probation officer grounds the arguable identity of ‘not so dangerous guns’ in the proper (for the legal realm) ‘factual paradigm.’ At the same time as they assume a paradigmatic role in the discourse, the ‘BB guns’ gains sufficient ambiguity to be able to return to the beginning, their first mention following the item ‘illegal weapons.’ The act of objection that evoked ‘illegal weapons’ during the conference got countered by the act of rejection. By meeting each other, the two acts form an adjacency pair that return the item under discussion to the place of its origin. The return means the sustained identity for the object ‘illegal weapon,’ whose transformations along the path of completing the adjacency pair of ‘report-objection’ failed to secure either one of them into a different identity. The defense attorney’s correspondence to the defendant in the wake of the Probation Officer’s rejection summarizes this process.

5. Identity Restitution

Letter from Attorney to Dane Savery (July 24, 2003):

Dear Dane:

Find enclosed herewith the response to my Objections. As I told you, we are going to have a difficult time getting any of these objections sustained by the Court. The response by the probation office is active. Get back to me.

Sincerely,

Jack Dorman

The letter finalizes the construction of the identity ‘illegal weapons’ by making it dissipate behind the purpose for its ‘deployment,’ the defense attorney’s ‘Objections.’ The letter is a result of the encounter between several arguables, or rhetorical identities, generated by the two sides in their responding to each other; hence, the reminder to the client that it is the Probation Officer’s response that ‘remains active.’ As soon as the ‘Objections’ close, the identity of the fixed object withers away, as it were, ceasing its dynamism until its next resurfacing in a similarly relevant legal fact. The conditions for that resurfacing are provided by the letter’s ending where the attorney invites the defendant to respond. A full hermeneutic circle emerges here, a completed trajectory, which begins with the attorney soliciting a response from the client and ends, after a certain course of actions, with the possibility of yet another problematization, and therefore a new action for the sake of law.

6. Concluding Remarks

There are several conclusions that can be drawn from the above analysis. First, in response to the original question, it appears that to fix an object in text does not mean halting its dynamism; it only means providing it with a platform for various appearances. In the legal discourse of the analyzed data these appearances occur within a specific space of signification, i.e., a case, which serves as the referential grid that gathers discursive actions into a particular “whole.” In this respect, the change of its identity means that, rather than being displaced, upon its engagement in either medium, text, or talk, a discursive object becomes transformed toward satisfying a specific context-imposed purpose. If we accept that the legal context presupposes that this purpose involves an argument, then discursive transformations change the object as long as they create a new figure, a new arguable. In the legal discourse, arguments tend to proceed along a particular path which is punctuated by case-relevant figures that, once documented, create an impression “fixed facts.” In fact, these

facts are but pivots that mark the starting point of argumentation. Their engagement leads to the process of figuration, which, in turn, involves revolutions around the initial point of invocation. As a result of these transformations, the object of discourse comes to possess multiple identities; importantly, none of these identities enjoys the status of the original or true identity; none of them counts as facts on their own.

The analyzed excerpt from a real criminal case demonstrated how an object of discourse, i.e., the term "illegal weapons," appeared as the original identity evoked as an account by the defense attorney and used for the construction of a legal objection to the Presentence Report, where this identity was previously "fixed." The purpose of the objection was the dismissal of the problematic object ("illegal weapons"), its removal from the record, its virtual disappearance. Instead, the item "illegal weapons" remained owing to the argument carried out by the Probation Officer who succeeded in retaining the original legal identity, while fighting down the imposition of a different one. As a result, at the end of its "journey" within the case-defined space of signification, the object "illegal weapons" returned to the place of its formation in the figure of "dangerous weapons" only to be "fixed" there again until the next surfacing. In the course of the argument, the object underwent several transformations, from "weapons" to "guns," from "guns" to "firearms" and then back to weapons, changing its facets, without, however, changing its pivot, the first identity brought into effect by an argument. From this perspective, the fact that the figurative identity belongs to the written field is less significant than its belonging to a space of signification in general and a certain argumentation field, in particular, for it is as an arguable that the term "illegal weapons" sustained itself in its course.

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Notes

[1] Ambiguity itself can become a means of definiteness when it is applied strategically. For example, 'In criminal cases, both the government and the defense tend to hear what they want to hear […] they create and interpret ambiguous utterances in the way that best serves their purposes" (Shuy 2001: 446).

[2] The fieldwork was occasioned by an international project 'Comparative Microsociology of the Criminal Defensework" located in Berlin, Germany under the auspices of Freie Universitaet Berlin. The project's objective has been examination of court hearings as ritualized events with an emphasis on how their ritualization and/or configuration are being achieved via various practices and activities performed and assembled by the defence ensemble. Therefore, at the core of the project lie those methods, artefacts, and devices that punctuate the process of legal performance at all stages of its enactment in different legal settings.

[3] Indictment: 21 U.S.C. § 841(a)(1), 841(b)(1)(A)(VIII)846, 843(b) and 18 U.S.C. § 2.

[4] The excerpt's coding reflects time, place, theme, and duration of the recorded interaction.

[5] Slang term for 'informant."

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